

Appln No. 10/748,626
Response to Notice of Non-Compliant
Amendment dated February 14, 2007
Notice of Non-Compliant Amendment of January 30, 2007

REMARKS

Applicants respectfully request reconsideration of the claims of this application in light of the present amendment and remarks presented herein.

Claims 1-18 are currently pending and stand rejected. Claims 1 and 18 are currently amended to clarify the language in response to the Office Action dated September 19, 2006. Support for these amendments can be found in the specification on page 11, line 27. No new matter has been added.

Various typographical errors have been corrected in the specification. No new matter has been added.

Rejection Under 35 U.S.C. §112, First Paragraph

Claims 1-18 were rejected under 35 U.S.C. §112, first paragraph, as failing to comply with the enablement requirement. According to the Examiner, the Applicants do not teach what is encompassed by "significantly reduced levels of casein."

Applicants respectfully disagree. Applicants do teach what is encompassed by "significantly reduced levels of casein." On page 6, lines 5-11 of the original specification, Applicants state:

For purposes of this invention, "significantly reduced levels of casein" or equivalent phrases are intended to mean that the cream cheese type product contains less than about 2 percent casein, and preferably less than about 1 percent casein. For purposes of this invention, a cream cheese type product which contains "essentially no casein" is intended to mean that it contains less than about 0.5 percent casein. Typically, conventional cheese type products contain about 5 to about 10 percent casein.

Applicants respectfully submit that the Examiner has not met her burden. In order to make a rejection, the examiner has the initial burden to establish a reasonable basis to question the enablement provided for the claimed invention. *In re Wright*, 999 F.2d 1557, 1562, 27 USPQ2d 1510, 1513 (Fed. Cir. 1993) (examiner must provide a reasonable explanation as to why the scope of protection provided by a claim is not adequately enabled by the disclosure).

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The minimal requirement is for the examiner to give reasons for the uncertainty of enablement. *In re Bowen*, 492 F.2d 859, 862-63, 181 USPQ 48, 51 (CCPA 1974). As discussed above, Applicants explicitly teach what is encompassed by “significantly reduced levels of casein.”

Applicants respectfully request that this rejection be withdrawn.

Rejection Under 35 U.S.C. §112, Second Paragraph

Claims 1-18 were rejected under 35 U.S.C. §112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicants regard as the invention. The Examiner asserts that the terms “optionally cooling” and “optionally pasteurizing” are indefinite because it is not clear whether Applicants intend to claim these steps. The Examiner explains that “[i]t appears that the cooling step is required as step (iii) then requires heat to bring temperature back up. It is not clear in step (vi) which mixture is cooled (*i.e.*, homogenized or optionally pasteurized).

Applicants respectfully disagree. The Examiner asserts that it is not clear whether Applicants intend to claim these steps. The steps are included in the claims and, therefore, the Applicants do intend to claim these steps. Claiming in alternative expressions is permitted if they present no uncertainty or ambiguity with respect to the question of scope or clarity of the claims. In *Ex Parte Cordova*, 10 USPQ2d 1949 (Bd. Pat. App. & Inter. 1989) the language “containing A, B and optionally C” was considered acceptable alternative language because there was no ambiguity as to which alternatives were covered in the claim. A similar holding was reached with regard to the term “optionally” in *Ex parte Wu*, 10 USPQ2d 2031 (Bd. Pat. App. & Inter. 1989).

With respect to the term “optionally cooling” in step (i) of claims 1 and 18, Applicants respectfully submit that such language does not cause any ambiguity or uncertainty. The Examiner states that “it appears that the cooling step is required as step (iii) then requires heat to bring temperature back up.” Cooling is *not* a required a step, it is plain from the claim language that the claim is an *optional* step. After the aqueous suspension containing the polymerized whey protein of step (i) is prepared, at least a portion of it (*i.e.*, the aqueous

suspension containing the polymerized whey protein) is *mixed* with water, and milk to obtain a mixture (as described in step (ii)). This new mixture described in step (ii) is heated to liquify the milkfat which was just added. (See Claims 1 and 18). Accordingly, the Examiner has mischaracterized the claimed method. The cooling step of step (i) is *not* required because the aqueous suspension containing the polymerized whey protein of step (i) must be reheated to bring the temperature back up. Rather, the heating of step (iii) is to liquify the milkfat that was added in step (ii). One of ordinary skill in the art would understand from the specification (especially upon consideration of the examples) the meaning of the phrase "optionally cooling." Thus, one of ordinary skill in the art would not find this use of "optionally cooling" unclear and would, in fact, consider it consistent with standard usage.

With respect to the term "optionally pasteurized", in step (v) of claims 1 and 18, Applicants respectfully submit that such language does not cause any ambiguity or uncertainty; however, the Applicants have amended claims 1 and 18 in a good faith attempt to respond to the Examiner's arguments. The Examiner states that, "[i]t is not clear in step (vi) which mixture is cooled (*i.e.*, homogenized or optionally pasteurized)." Step (v) provides that the homogenized mixture from step (iv) *may be optionally* pasteurized. Accordingly, if the homogenized mixture is not pasteurized, then that mixture (*i.e.*, the homogenized mixture) of step (iv) is cooled in step (vi). If the homogenized mixture *is* pasteurized according to step (v), then that optionally pasteurized mixture of step (v) is cooled in step (vi). One of ordinary skill in the art would understand from the specification (especially upon consideration of the examples) the meaning of the phrase "optionally pasteurized." Thus, one of ordinary skill in the art would not find this use of "optionally pasteurizing" unclear and would, in fact, consider it consistent with standard usage.

Applicants respectfully request that this rejection be withdrawn.

Rejection Under 35 U.S.C. §102(b)

Claim 18 was rejected under 35 U.S.C. §102(b) as being anticipated by Han et al. (U.S. Patent No. 6,419,975). According to the Examiner, Han et al. teach a caseinless cream cheese-

like product as is claimed. However, Applicants respectfully disagree. Han et al. does not teach all of the limitations of claim 18.

Claim 18, as currently amended, provides:

18. A cream cheese product having significantly reduced levels of casein, said cream cheese product being obtained by a method comprising:

(i) preparing an aqueous suspension having a protein concentration of about 5 to about 20 percent from water and a whey protein concentrate;

adjusting the pH of the aqueous suspension, if necessary, to a pH of about 7 to about 9; and

heating the aqueous suspension in a single heat treatment step to a temperature of about 70 to about 95°C. for a time sufficient to obtain a polymerized whey protein having about 30 to about 85 percent disulfide crosslinking; and

optionally cooling the aqueous suspension containing the polymerized whey protein; and

(ii) mixing at least a portion of the aqueous suspension containing the polymerized whey protein from (i), water, and milkfat to obtain a mixture;

(iii) heating the mixture to a temperature of about 55 to about 75°C. to liquify the milkfat;

(iv) homogenizing the mixture from (iii) at about 1,500 psi to about 5,000 psi to form a homogenized mixture;

(v) optionally pasteurizing the homogenized mixture;

(vi) cooling the homogenized mixture of step (iv) or the optionally pasteurized mixture of step (v) to approximately ambient temperature;

(vii) inoculating the mixture with a lactic culture and fermenting the inoculated mixture to obtain a fermented mixture;

(viii) mixing a stabilizer and optionally a salt with the fermented mixture and cooking at a temperature of about 70 to about 105°C. to obtain a cooked material; and

(ix) homogenizing the cooked material to obtain the cream cheese product having significantly reduced levels of casein.

Han et al. do not teach all of the steps enumerated in Claim 18. Accordingly, claim 18 is not anticipated by Han et al. Han et al. do not teach adjusting the pH of about 7 to about 9 as described in step (i). Han et al. do not teach heating the aqueous suspension in a single heat treatment step to a temperature of about 70 to about 95°C for a time sufficient to obtain a polymerized whey protein having about 30 to about 85 percent disulfide crosslinking as described in step (i). Han et al. also do not teach optionally cooling the aqueous suspension containing the polymerized protein. In fact, Han et al. teach the use of denatured protein. Han et al. do not teach optionally pasteurizing the homogenized mixture as described in step (v). Finally, Han et al. do not teach inoculating the mixture with a lactic culture and fermenting the inoculated culture to obtain a fermented mixture as described in step (vii).

Perhaps more importantly, Han et al. does not teach the use of a polymerized whey protein, much less one having about 30 to about 85 percent disulfide crosslinking. Han et al.'s composition contains a denatured protein. Clearly, the present composition and the composition of Han et al., in spite of the fact that they both contain reduced levels of casein, are very different. Thus, the present composition is not obvious in view of Han et al.

Applicants respectfully request that this rejection be withdrawn.

Conclusion

In view of the above, Applicants respectfully submit that pending claims 1-18 are in condition for allowance. Therefore, Applicants respectfully request that this case be passed to issuance.

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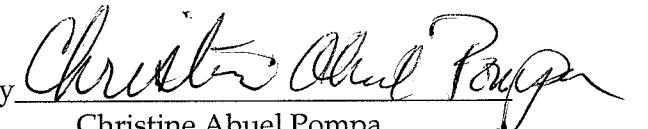
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The Commissioner is hereby authorized to charge any additional fees which may be required with respect to this communication or credit any overpayment to Deposit Account No. 06-1135.

Respectfully submitted,

FITCH, EVEN, TABIN & FLANNERY

By 
Christine Abuel Pompa
Reg. No. 54,952

Date: February 15, 2007

120 South LaSalle Street
Suite 1600
Chicago, Illinois 60603-3406
Telephone: 312.577.7000
Facsimile: 312.577.7007